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In the Supreme Court of the United States

OCTOBER TERM, 1979

PHILIP MILESTONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government's election to proceed on part of an assertedly duplicitous count in the indictment in this case constituted an improper amendment of the indictment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12a-13a) was entered on June 30, 1980. The petition for a writ of certiorari was filed on August 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of bribery of a public official, in violation of 18 U.S.C. 201(b)(1) and 2 (Count III). He was sentenced to two years' imprisonment and a fine of $10,000.[1] The court of appeals affirmed by judgment order, 591 F. 2d 1337 (3d Cir.), and this Court denied certiorari, 444 U.S. 825 (1979). Petitioner thereafter sought collateral relief under 28 U.S.C. 2255. However, the district court refused to vacate petitioner's sentence (Pet. App. 14a-16a), and the court of appeals affirmed (Pet. App. 1a-11a).

1. The evidence at trial showed that in 1977 petitioner was being audited by an Internal Revenue Service agent, Robert Mastrogiovanni, concerning his tax returns for 1974 and 1975. Petitioner was also obligated under a 1975 agreement with the IRS to make monthly payments of $3,000 in order to pay approximately $32,000 in back taxes owed for 1971 and 1972 (Tr. 172-174). In the spring of 1977, when petitioner was in arrears on his payments,

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[1]Petitioner was acquitted on one count charging conspiracy to bribe two agents of the Internal Revenue Service, in violation of 18 U.S.C. 371, and two counts of bribery relating to the conduct of an audit of petitioner's tax returns, in violation of 18 U.S.C. 201.

Arnold Small, an officer with the Collection Division of the IRS, was assigned the delinquent tax account (Tr. 169-172). On November 16, 1977, petitioner paid $200 to Agent Small in exchange for the reduction of petitioner's monthly payments on the delinquent account (Tr. 245-246, 254-268).

2. Count III of the indictment returned by the grand jury alleged that petitioner had given a bribe to Agent Small to influence both Small's conduct in collecting the delinquent taxes and the conduct of Agent Mastrogiovanni in connection with the separate audit. Petitioner moved to dismiss this count, contending that it was duplicitous by virtue of the reference to an intent to influence both agents. In response to this motion, the government offered to make an election between the assertedly duplicitous charges in Count III by deleting the language in that count alleging that petitioner had paid the money to Agent Small with the intent to influence the conduct of Agent Mastrogiovanni.

In response to the government's motion to remove these references, petitioner's counsel stated at the pretrial hearing: "Well, your Honor, that was my alternative request in my motion to dismiss to strike that language as surplusage; and your Honor, I have no objection to the Government making the election at this time" (Pet. App. 2a). Accordingly, as submitted to the jury, Count III alleged only an intent to influence Agent Small.[2]

ARGUMENT

Petitioner contends that the deletion from Count III of the reference to Agent Mastrogiovanni constituted an unlawful amendment of the indictment and that he was,

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[2]A similar change was made in Count II of the indictment, on which petitioner was acquitted (Pet. App. 2a).

in effect, convicted of an offense not charged by the grand jury. Both courts below properly rejected this claim.

1. We note at the outset our view that petitioner twice waived this claim in the course of the original prosecution, and that the claim therefore was not a proper subject for collateral review on a motion pursuant to 28 U.S.C. 2255. First, while petitioner objected to the count in the district court on the ground that it was duplicitous, he apparently never claimed that the district court's acceptance of the government's election constituted an impermissible amendment of the indictment. We believe that the failure to specify this objection during the proceedings in the district court constituted a waiver of the claim under Fed. R. Crim. P. 12(b)(1) and (f) and foreclosed a later grant of collateral relief. See *Davis* v. *United States,* 411 U.S. 233 (1973). Second, petitioner did not raise the issue on direct appeal from his conviction, although the facts and law relating to the matter were fully available at that time. Since the claim does not relate to the fairness of petitioner's trial or the reliability of the finding of guilt, it is not consonant with the sound administration of justice to permit it to be litigated for the first time in a collateral attack on the conviction.[3]

2. Petitioner's argument appears to rest in large part on the assumption that because the indictment returned by the grand jury charged him with giving money to Agent Small with intent to influence the conduct of both Small and Mastrogiovanni, the government would have been required to prove at trial that petitioner made the single payment with the intent to influence both officials. Thus,

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[3]The court of appeals concluded that the issue of waiver was a close one; it chose not to decide the case on that basis, but instead to reach the merits. Pet. App. 4a-5a.

petitioner argues, the court's deletion of the reference in the indictment to one of the agents eased the government's burden by enabling it to obtain a conviction by proving an intent to influence only one of the officers. See Pet. 12-13. This argument fails because its premise is in error.

Petitioner concedes (Pet. 8-9) that both Small and Mastrogiovanni are "public officials" within the meaning of 18 U.S.C. 201 and that it would be an offense under the statute to make a payment with the intent to influence *either* of them. Where an offense may have been committed in one of several ways—here, with an intent to influence either agent—it has been the long-established practice to allege such alternative means of committing the offense in the conjunctive, not the disjunctive. As the court of appeals recognized, where the indictment is drawn in this fashion, the accused may be convicted on proof of either allegation. Pet. App. 6a n.4, citing 2 *Wharton's Criminal Procedure* § 291 (12th ed. 1975); see also Pet. App. 9a; *Goto* v. *Lane*, 265 U.S. 393, 398-399 (1924); *Confiscation Cases*, 87 U.S. (20 Wall.) 92, 104-105 (1873); *United States* v. *Abascal*, 564 F. 2d 821, 832 (9th Cir. 1977), cert. denied, 435 U.S. 953 (1978); 8 *Moore's Federal Practice* para. 8.03[2], at 8-7 (2d ed. 1980); 1 C. Wright, *Federal Practice and Procedure: Criminal* § 125, at 240 (1969), and cases cited. In other words, if the reference to Agent Mastrogiovanni had not been deleted from Count III of the indictment when the case went to the jury, petitioner nonetheless could have been convicted by proof that the payment had been made with the intent to influence only Agent Small. Thus, contrary to petitioner's contention, the deletion of the reference to an intent to influence Agent Mastrogiovanni did not ease the government's burden or enable petitioner to be convicted of an offense not charged in the indictment.

3. Petitioner's argument also overlooks the fact that the deletion of the reference to Agent Mastrogiovanni occurred as a result of petitioner's challenge to Count III as duplicitous—*i.e.*, charging more than one offense in the same indictment.[4] The vice of duplicitousness is not that it undermines the integrity of the charges made by the grand jury as such, but rather that it creates the possibility of prejudice to the defendant at trial because "a jury may find a defendant guilty on a count without having reached a unanimous verdict on the commission of a particular offense." *United States* v. *UCO Oil Co.*, 546 F. 2d 833, 835 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977); see also *United States* v. *Orzechowski*, 547 F. 2d 978 (7th Cir. 1976), cert. denied, 431 U.S. 906 (1977); *United States* v. *Starks,* 515 F. 2d 112, 116-117 (3d Cir. 1975), aff'd on remand, 530 F. 2d 963 (1976), aff's in part and rev'd in part *sub nom. Abney* v. *United States,* 431 U.S. 651 (1977).

Where a count in an indictment is challenged as duplicitous, the proper remedy is widely recognized to be election by the government of the charge on which it wishes to proceed. See, *e.g., United States* v. *Bowline,* 593 F. 2d 944, 947-948 (10th Cir. 1979); *United States* v. *Starks*, *supra*, 515 F. 2d at 117; *United States* v. *Kearney*,

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[4]As the court of appeals pointed out (Pet. App. 10a n.8), there is considerable doubt whether Count III in fact charged more than one offense. That count charged the making of a single payment, but with the intent to influence two agents. Like the court below, we question whether Congress intended to authorize multiple punishment for the making of a single payment merely because it is made with the intent to influence more than one public official. Instead, Count III appears to have charged a single offense committed by one of several means stated conjunctively, in conformity with the general rule discussed above. If the court of appeals is correct on this point, the deletion of the reference to Agent Mastrogiovanni in Count III resulted in a *benefit* to which petitioner was not entitled, because it deprived the government of the opportunity to prove one of the alternative means by which the offense was committed.

444 F. Supp. 1290, 1295 (S.D.N.Y. 1978); 1 C. Wright, *Federal Practice and Procedure: Criminal, supra,* § 145, at 335; 8 *Moore's Federal Practice, supra,* para. 8.04[1], at 8-12. Election between two offenses charged in a single count raises no Fifth Amendment problems because it merely narrows the indictment and adds nothing that was not first considered by the grand jury. See *Russell* v. *United States*, 369 U.S. 749, 770 (1962); *Stirone* v. *United States*, 361 U.S. 212, 217 (1960); *Salinger* v. *United States*, 272 U.S. 542, 548-549 (1926); *United States* v. *Kearney, supra,* 444 F. Supp. at 1295.

4. Petitioner contends, however, that the deletion of the reference to one agent is inconsistent with this Court's decision in *Ex parte Bain*, 121 U.S. 1 (1887). In *Bain*, the indictment had charged the petitioner, the cashier of a national bank, with making a false report "with the intent to deceive the Comptroller of the Currency and the agent appointed to examine the affairs" of the bank (*id.* at 4; emphasis omitted). The statute under which the petitioner was indicted, however, while making it a crime to make a false report with intent to deceive an agent appointed to examine the bank's affairs, made no mention of the Comptroller of the Currency (*id.* at 3). Petitioner demurred to the indictment, and the demurrer was sustained, apparently because of the reference to the Comptroller. Thereafter, on the government's motion, the court ordered that the reference to the Comptroller be deleted from the indictment, and the petitioner was convicted. This Court set aside the conviction, finding that the trial court had improperly amended the indictment.

As the court below recognized, however (Pet. App. 9a), the alteration of the language involved in *Bain* appears to have transformed an indictment from one that did not state an offense (at least in part) into one that did, and the

alteration was made to avoid an adverse ruling previously made on a demurrer, so that a "defendant who was out of court on his successful demurrer was brought back in by the action of the trial judge in modifying the indictment" (Pet. App. 6a-7a; see also *Salinger* v. *United States*, *supra*. 272 U.S. at 549). In the present case, it was a crime to make a payment with the intent to influence *either* IRS agent. The deletion of the reference to one therefore did not transform an indictment that, in part, did not state an offense into one that did. And, as explained above, the defect sought to be cured by the district court in this case did not call into question the validity or integrity of the charges returned by the grand jury, as in *Bain*. The charges against petitioner contained in the indictment returned by the grand jury were concededly valid; the defect was one of form, resulting from their joinder in a single count, which had to be corrected to avoid possible prejudice to the defendant *at trial*. This Court's decision in *Ex parte Bain* does not prohibit a narrowing of charges to prevent prejudice in this fashion. *Ford* v. *United States*, 273 U.S. 593, 602 (1927); *Salinger* v. *United States*, *supra*, *United States* v. *Abascal*, *supra*, 564 F. 2d at 832-833; *United States* v. *Prior*, 546 F. 2d 1254, 1257 (5th Cir. 1977).

5. Finally, petitioner, through counsel, *requested* in district court, as an alternative to his motion to dismiss Count III, that the reference to either Small or Mastrogiovanni be deleted as "surplusage," and counsel reiterated at the pretrial hearing that he had "no objection" to the government's election (Pet. App. 2a). Rule 7(d), Fed. R. Crim. P., authorizes surplusage to be stricken from an indictment on the defendant's motion. Petitioner cannot now complain because the district court accepted his suggestion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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